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L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–39 OF 2010(B)
ZAKI AZMI CHIEF JUSTICE, ABDULL HAMID EMBONG AND ZULKEFLI MAKINUDIN FCJJ
14 JUNE 2010

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Preventive Detention — Detention — Habeas corpus — Appellant detained under detention order pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') — Appellant's applied for habeas corpus — Challenge by appellant of non-compliance with s 3(2)(a) and (b) of the Act by respondent — Failure to produce affidavits of arresting officer — Whether vitiate detention order — Whether detention order illegal — Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(a), (b) & 6(1)

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E The appellant was detained under a detention order pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The appellant had applied for a writ of habeas corpus, but the High Court rejected the said application. Aggrieved by the decision, the appellant filed the present appeal. The sole ground of appeal raised was on the non-compliance with s 3(2)(a) and (b) of the Act. The appellant submitted that, since there were no affidavits filed by the respondent to rebut the challenge by the appellant of that non-compliance to show that the arrest and detention in custody by the police was properly discharged by the designated officers under s 3(2)(a) and (b) of the Act, the subsequent detention order made by the Deputy Minister was therefore illegal. The appellant also conceded that if the case of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 ('Mohd Faizal') was good law then the present appeal was groundless. However, the appellant submitted that a different interpretation should be given to the non-compliance that arose in the present appeal.

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Held, dismissing the appeal:

(1) The court refused to depart from the decision in the case of *Mohd Faizal*. A writ of habeas corpus ought to be directed only against the current detention order even if the earlier arrest of the detainee was irregular. The court was also not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which was the sphere of the subjective exercise of the Minister's discretion under the various executive detention legislations unless mala fide on his part was shown. Any questions on the legality or propriety of the arrest or detention of a detainee at the

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investigation stage was not a relevant consideration nor was it a pre-condition to the order of detention of the Minister (see paras 4 & 9).

(2) The scheme under the Act was that before a detention order was directed, the police would have needed to conduct an investigation which included the power to detain any suspected persons. The manner on conducting the investigations and arrests at this stage, was neither a condition precedent nor a matter which had a direct link with the detention order and thus not a ground for judicial review. Previous cases such as *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45, which held that a detention order made against a suspect who had been illegally detained by the police at the investigation stage was subject to judicial review were no longer good law since this was not a procedural non-compliance of a condition precedent to nullify the detention order (see para 11).

(3) The exclusion to produce affidavits of the arresting officers who exercised their powers of detention under s 3(2)(a) and (b) of the Act was not a defect that might vitiate the detention order (see para 14).

[Bahasa Malaysia summary

Perayu ditahan di bawah perintah tahanan mengikut s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta'). Perayu telah memohon writ habeas corpus, tetapi Mahkamah Tinggi menolak permohonan tersebut. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Satu-satunya alasan rayuan yang ditimbulkan adalah berkaitan ketidakpatuhan dengan s 3(2)(a) dan (b) Akta. Perayu berhujah bahawa, disebabkan oleh ketiadaan afidavit yang difailkan oleh responden untuk mencabar hujahan perayu berkenaan ketidakpatuhan tersebut bagi menunjukkan bahawa penangkapan dan penahanan dalam jagaan polis telah dijalankan dengan sewajarnya oleh pegawai yang ditetapkan di bawah s 3(2)(a) dan (b) Akta, maka, perintah tahanan berikutnya yang dibuat oleh Timbalan Menteri adalah tidak sah. Perayu juga mengakui jika kes *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 ('Mohd Faizal') adalah undang-undang yang boleh diguna pakai maka rayuan semasa tidak berasas. Walau bagaimanapun, perayu berhujah bahawa tafsiran yang berbeza harus diberikan kepada ketidakpatuhan yang timbul dalam rayuan semasa.

Diputuskan, menolak rayuan:

(1) Mahkamah enggan menyimpang dari keputusan dalam kes *Mohd Faizal*. Writ habeas corpus hendaklah diarahkan hanya terhadap perintah tahanan semasa walaupun penahanan terdahulu tahanan tidak teratur. Mahkamah juga tidak mengambil kira tentang kekaburan, kecukupan atau kerelevanan alasan-alasan penahanan yang berada dalam lingkungan

pelaksanaan subjektif budibicara Menteri di bawah beberapa undang-undang penahanan eksekutif melainkan jika mala fide di pihaknya telah ditunjukkan. Apa-apa persoalan mengenai kesahan atau kesesuaian penangkapan atau penahanan seseorang tahanan di peringkat penyiasatan itu bukan pertimbangan yang relevan atau prasyarat kepada perintah tahanan oleh Menteri (lihat perenggan 4 & 9).

(2) Skim di bawah Akta adalah bahawa sebelum perintah tahanan diarahkan, pihak polis perlu melakukan siasatan yang termasuk kuasa untuk menahan mana-mana orang yang disyaki. Cara menjalankan siasatan dan penangkapan pada peringkat ini bukan merupakan prasyarat atau perkara yang mempunyai hubungan langsung dengan perintah tahanan dan oleh itu, ia bukan alasan untuk semakan kehakiman. Kes-kes terdahulu seperti *Koh Yoke Koon v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1988] 1 MLJ 45, yang menegaskan bahawa suatu perintah tahanan yang dibuat terhadap seorang suspek yang telah ditahan secara tidak sah oleh polis pada peringkat siasatan adalah tertakluk kepada semakan kehakiman bukan lagi undang-undang yang boleh digunapakai kerana ia bukan ketidakpatuhan prosedur terhadap prasyarat untuk membatalkan perintah tahanan (lihat perenggan 11).

(3) Kegagalan untuk mengemukakan afidavit-afidavit pegawai-pegawai yang menangkap yang menjalankan kuasa penahanan mereka di bawah s 3(2)(a) dan (b) Akta tersebut bukanlah suatu kecacatan yang boleh memudaratkan perintah tahanan (lihat perenggan 14).]

Notes

For cases on detention in general, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1570–1573.

Cases referred to

Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 2 MLJ 129, FC (refd)

Koh Yoke Koon v Minister For Home Affairs, Malaysia & Anor [1988] 1 MLJ 45 (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] MLJU 667; [2005] 3 CLJ 914, FC (refd)

Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2009] 1 MLJ 445; [2009] 1 CLJ 686, FC (refd)

Minister For Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29, SC (refd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (refd)

Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403; [2006] 4 CLJ 687, FC (refd)

Ong Hong Seng v Menteri Dalam Negeri, Malaysia & Ors (Criminal Appeal No

05–160 of 2009(J) (unreported) (refd)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran [2006] 6 MLJ 689; [2006] 4 CLJ 847, FC (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(a), (2)(b), (2)(c), 5, 6(1)
Emergency (Public Order and Prevention of Crime) 1969 ss 3(3), 3(3)(a), (3)(b), (3)(c), 4(1), 9

N Sivananthan (Tina Ong with him) (Sivananthan & Co) for the appellant.
Amir Nasruddin (Senior Federal Counsel, Ministry of Home Affairs) for the respondents.

Abdull Hamid Embong FCJ (delivering judgment of the court):

[1] The appellant was detained under a detention order dated 9 April 2009 pursuant to s 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') for drugs trafficking activities. He applied to the High Court for a writ of habeas corpus for his release. The High Court had on 19 February 2010 rejected his application. He now appeals to the Federal Court.

[2] The sole ground of appeal is the complaint of non compliance with s 3(2)(a) and (b) of the Act. It was submitted that since there are no affidavits filed by the respondent to rebut the challenge by the appellant of that non compliance to show that the arrest and detention in custody by the police was properly discharged by the designated officers under those subsections, the subsequent detention order made by the Deputy Minister is therefore illegal.

[3] The learned senior federal counsel while admitting that there are no affidavits in reply submitted that this does not affect the legality of the detention order made by the Deputy Minister, relying on the authorities which we will now discuss.

[4] The legal issue for our determination in this appeal is neither new nor novel. It has been considered in the decisions of this court in the cases of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 and *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689; [2006] 4 CLJ 847. Learned counsel for the appellant conceded that if *Mohd Faizal* is good law then this appeal is groundless. He however submitted that a different interpretation should be given to the non compliance that arose in this appeal. We say that we are not departing from that decision.

A **[5]** In the former case the question that arose was whether the defects in the arrest of the detainee vitiated the subsequent detention order made by the Deputy Minister. What the Federal Court held in that case may be so summarised. Firstly, an application for a writ of habeas corpus must be directed against the current detention order even when the earlier arrest had been
B irregular. Secondly, any irregularity for non compliance with the procedures under s 3(2)(a), (b) and (c) is not a relevant matter for consideration when it has been superseded by the Deputy Minister's detention order made under s 6(1) of the Act. Thirdly, the precondition to the exercise of the Deputy Minister's power to order a detention is merely to consider the reports of investigation
C made by the police and the inquiry officer. And lastly, there is no necessity to explain the sequence of events that transpired prior to the making of the detention order, and it follows that there is no necessity to file explanatory affidavits in relation to the prior arrest of the detainee.

D **[6]** *Arasa Kumaran* concerns an executive detention order made by the Minister under the Emergency (Public Order and Prevention of Crime) 1969 ('the POPOC'). In that case the complaint made by the respondent was on the non-compliance by the police with the requirements of s 3(3)(a) and (b) of the
E POPOC ie, the irregularities in the prior arrest made by the police preceding the detention order. The Federal Court held that the ratio decidendi of *Mohd Faizal* stating that any illegality in the prior arrest and detention cannot be the subject matter of inquiry and thus not relevant in any judicial review, is similarly applicable to a detention order under the POPOC. In *Arasa Kumaran*
F it was similarly held that there is no necessity for affidavits to be filed in relation to the prior arrest and detention.

[7] *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687 involved a
G challenge on the omission of the inquiry officer to adduce any evidence by way of affidavit to show that an inquiry was conducted by a proper and qualified inquiry officer to prepare a report under s 5 of the Act for the consideration of the Minister.

H The Federal Court held that since the report of the inquiry officer is a statutory pre-condition under s 5 to the exercise of the Minister's powers of detention under s 6(1) of the Act, the failure to produce any evidence to prove that the inquiry officer had complied with that requirement under s 5 or to support 'the role that he played' under that section, is a clear breach of a statutory procedural
I requirement and thus subject to judicial review. Unlike the situation in *Mohd Faizal*, the report of the inquiry officer in this case was held by the Federal Court as a necessary and mandatory pre-condition to the exercise of the Minister's power under s 6(1) of the Act since the law requires the Minister to consider that report before issuing a detention order. As such affidavits need to

be filed to answer the allegation that the inquiry officer had not conducted any investigations. And since there was no explanation from the inquiry officer to show the role played by him, the regularity of the current detention by the Minister was itself subject to judicial review. The defect thus is not on the illegality of the prior detention (as in *Mohd Faizal*) but affects the current detention order of the Minister itself.

[8] The recent decision of this court in *Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 MLJ 445; [2009] 1 CLJ 686, a case concerning a detention order under s 4(1) of the POPOC, also needs a mention. In that case, the complaint was against the refusal of the advisory board (due to the short notice), to issue summons to witnesses required by the appellant in the representation proceedings before it, pursuant to s 9 of the POPOC. The Federal Court held that s 9 is not a mandatory procedural requirement, and that the failure of the advisory board to adhere to it would not subject the detention order to a judicial review.

[9] The cases referred to above illustrate the principles upon which the courts will consider in allowing for judicial review on an executive detention order. It may be stated this way. A writ of habeas corpus must be directed only against the current detention order even if the earlier arrest of the detainee is irregular. The court is also not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of the subjective exercise of the Minister's discretion under the various executive detention legislations unless mala fide on his part is shown (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129 see also *Minister For Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29). Any questions on the legality or propriety of the arrest or detention of a detainee at the investigation stage is not a relevant consideration nor is it a pre-condition to the order of detention of the Minister.

[10] Only when statute requires an act to be a condition precedent to the making of a detention order can a valid complaint be made against that detention. Under the Act there are two conditions precedent for the Minister to consider before making a detention order. These are found in s 6(1) of the Act which states that:

> 6 Power to order detention and restriction of persons
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> (1) Whenever the Minister, after *considering*:
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> (a) the *complete report of investigation* submitted under subsection (3) of section 3 and
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> (b) the *report of the Inquiry Officer* submitted under subsection (4) of section 5,

A is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years. (Emphasis added.)

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[11] The scheme under the Act (similarly under the POPOC) is that before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner on C conducting the investigations and arrests at this stage, is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review. Previous cases such as *Koh Yoke Koon v Minister For Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45, which held that a detention order made against a suspect who had been illegally detained by the D police at the investigation stage is subject to judicial review are no longer good law since this is not a procedural non-compliance of a condition precedent to nullify the detention order (see also the Federal Court case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914).

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[12] Learned counsel for the appellant also referred us to the case of *Ong Hong Seng v Menteri Dalam Negeri, Malaysia & Ors* (Criminal Appeal No 05–160 of 2009(J) (unreported)). In this case the Federal Court had allowed the issue of a writ of habeas corpus applied by the appellant who was F detained under s 4(1) of the POPOC. We have no benefit of a written judgment, but from perusal of the appeal records it is clear that the thrust of the complaint in this case was against the failure of the respondent to adduce evidence that the officer who prepared the report under s 3(3)(c) of the POPOC for submission to the Minister was not one of the officers who was G designated by the Inspector General of Police to do the reporting to the Minister under that subsection. As a result, no report, which is a condition precedent to a valid detention order, was before the Minister for his consideration. The effect of this non-compliance, by the same course of reasoning of the Federal Court in *Mohd Faizal*, is to invalidate the detention H order made by the Minister. This is because the consideration of that report under s 3(3) is part of the decision making process, ie, a procedural requirement, a breach of which will subject the order of the Minister to judicial review.

I **[13]** It may be mentioned that the scheme under the POPOC differs from that of the Act in that the former makes no mention of the need for a report from an inquiry officer for the Minister's consideration. This makes the report from the Inspector General of Police or his designated officers, the only and crucial report for the Minister's consideration before making a detention order.

[14] Coming back to the pith of the matter in this appeal, we hold that the exclusion to produce the affidavits of the arresting officers who exercised their powers of detention under s 3(2)(a) and (b), is not a defect that may vitiate the detention order.

[15] For these reasons, this appeal is dismissed.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar